No. 84-861

# In the Supreme Court of the United States

**OCTOBER TERM, 1984**

NATIONAL LABOR RELATIONS BOARD,
*Petitioner*,

vs.

INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, AFL-CIO, et al.,
*Respondents.*

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

## REPLY BRIEF OF AMERICAN TRUCKING ASSOCIATIONS, INC., AND TIDEWATER MOTOR TRUCK ASSOCIATION IN SUPPORT OF PETITIONER

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## ARGUMENT

The brief in opposition filed by Respondent International Longshoremen's Association and its allies, the maritime employers of longshoremen (hereinafter "the Shipping Group"), in support of the ILA's Rules on Containers obfuscates rather than sharpens the focus on the fundamental issues before the Court.

## I. The Shipping Group Improperly Defines The Work In Dispute.

The Shipping Group repeatedly misdefines the work at issue in this case as "the stuffing and stripping of the longshore employers' containers *at the piers*." ILA Brief at 16-17, 18 & n.17, 29, 36 (emphasis added).[1] The Shipping Group suggests that the Board also defined the disputed work as being located "at the piers." ILA Brief at 17, 29. In fact, neither the ALJ[2] nor the Board held that the stuffing and stripping of containers "at the piers" is the work at issue. The Board explicitly defined the disputed work as the loading and unloading of all containers anywhere within the 50-mile zones. Pet. App. 57a. The Court of Appeals adopted this definition. Pet. App. 22a.

Clearly, the disputed work is not the stripping and stuffing of containers at the piers, but only that which is performed off-pier in violation of the Rules. By defining the disputed work as the stuffing and stripping of containers "at the piers," the Shipping Group seeks to transform neutral maritime employers of ILA labor into primary employers. Thus, the Shipping Group argues that the Rules cannot be "tactically calculated to satisfy union objectives elsewhere," because "the Rules do not address off-pier

1. Citations to the Brief of the Shipping Group will be "ILA Brief at ....." Citations to other briefs will be designated by the abbreviated name or acronym of the party sponsoring its submission.

2. The ILA misquotes the ALJ regarding the locus of the disputed work. ILA Brief at 17, 29. The ALJ stated "the 50-mile Rule is narrowly tailored to the stripping and stuffing of containers." He did not limit this work to work "at the piers." The ALJ then stated that the disputed work "was performed historically at the piers by deepsea ILA longshoremen, and elsewhere by either truckers, warehousemen, or consolidators, at inland points." Pet. App. 119a.



work," and "[t]here is no dispute between the longshoremen and the trucking employers." ILA Brief at 36.

These arguments are incredible. The Rules do not prohibit steamship lines from releasing containers to all off-pier employers; they only come into effect when certain inland employers offend the ILA by stripping and stuffing containers in violation of the Rules.[3] Thus, the primary target of the Rules has always been those inland employers from whom the ILA seeks the disputed container work. The mere fact that the ILA would like to perform the disputed work on the piers, or that the Rules state that the disputed work shall be performed on the piers, does not control the definition of the disputed work or erase the fact that the disputed work has traditionally been performed off-pier.

In *NLRB v. International Longshoremen's Assn.*, 447 U.S. 490 (1980) (*"ILA I"*), this Court recognized the distinction between traditional longshore work and the disputed work. *ILA I*, 447 U.S. at 509, 510. The Court stated that this was not a case where disputed work had simply been transferred from the unit for performance elsewhere, but rather was a case where "technological innovation change[d] the method of doing the work, instead of merely shifting the same work to a different location." 447 U.S. at 505. The Court in *ILA I* did not mandate a definition of the work in dispute and certainly did not sanction the Shipping Group's definition of the work as the stuffing and stripping of containers at the piers. Rather, it repeatedly left the definition of the work to the Board on remand. 447 U.S. at 509 n.23, 511 n.26. The Board found as a matter of fact that the definition of the disputed work

3. The 1974 edition of Rules 1 and 2 defines the work in dispute as the work performed by motor carriers and warehousemen *away* from the piers. Pet. App. 224a-226a.

encompassed the off-pier stuffing and stripping of containers within 50 miles of the port. It is this off-pier disputed work which must be compared to traditional on-pier ILA work to determine the true objective of the Rules.

## II. The Board Properly Applied The Functional And Historical Relationship Test In Considering Short-Stopping And Specialty Warehousing.

The Shipping Group inaccurately asserts in its brief that "there is no doubt" that the Board found the disputed short-stopping and warehousing work "to be functionally related to the traditional work of longshoremen and loading and unloading cargo on and off a ship for ocean transport." ILA Brief at 28. No language in the Board's decision states such a conclusion. In discussing the functional relationship of short-stopping work to traditional longshoremen's work the Board does state: "It is clear that the Administrative Law Judge considered the work claimed by *this rule* to be functionally related to traditional work of longshoremen in loading and unloading cargo on and off the ship for ocean transport."[4] Pet. App. 54a (emphasis added). This language, however, simply restates the ALJ's finding in connection with the general work preservation objective of the Rules; it does not address a comparison involving short-stopping. "This rule" refers to ILA Rule 1, which covers work performed by NVOCCs, motor carriers, and others not involved in short-stopping. Pet. App. 224a. The Board made it clear that this overall conclusion did not apply to short-stopping when it subsequently stated that the ALJ

4. The Shipping Group also mistakenly relies on the Board's statements at Pet. App. 53a and 58a-59a, which merely relate to the work of NVOCCs and consolidators, and support the Board's conclusion that the Rules have an overall work preservation purpose.



"concluded that the 50-mile Rule as applied to FSL containers handled by truckers, sought to claim work *traditionally performed by other employees.*" Pet. App. at 55a (emphasis added). It made a similar exception when it stated that the ALJ "also found that some of the short-term and long-term warehousing work claimed under this rule had never been performed by ILA-represented employees at the pier, but rather had traditionally been performed only by employees at inland public warehouses." Pet. App. at 56a. The Board unequivocally stated that "we . . . agree with [the ALJ's] findings and conclusions regarding the application of the general 50-mile rule to consolidators, short-stopping and warehousing." *Id.* at 58a. Thus, the Board recognized that even though the Rules have an overall work preservation objective, short-stopping and certain warehousing work are not related to the longshoremen's traditional functions, and are therefore beyond the lawful reach of the Rules.

If indeed the Board had found, as suggested by the Shipping Group, that short-stopping work is functionally related to traditional ILA work, that finding would automatically have led to a finding that the application of the Rules to short-stopping and speciality warehousing is lawful. No further analysis would have been required, because it would have been clear that work had originated within the longshore unit and had not lost its character as longshore work by changing into a service of a different kind.[5] For example, this same threshold analysis

5. Such a change occurred in *Carrier Air Conditioning Co. v. NLRB*, 547 F.2d 1178 (2d Cir. 1976), *cert. denied*, 431 U.S. 974 (1977) and *Associated General Contractors of California, Inc. v. NLRB*, 514 F.2d 433 (9th Cir. 1975), where products were found to have so changed their character that they lacked a functional relationship to traditional bargaining unit work.

resolved the issue regarding consolidation of LCL containers. The ALJ and the Board concluded that "ILA represented longshoremen had traditionally performed work which was functionally related to this work," which had been "diverted away from the pier by the shipping lines themselves," and "which had previously been performed on the pier by longshoremen." Pet. App. 53a.

Upon finding that the character of short-stopping is unrelated to longshore work the ALJ and the Board identified circumstances they felt more fully explained why the Rules are calculated to satisfy ILA "objectives elsewhere" than at the piers. The ALJ pointed to the fact that short-stopping work "was neither created by containerization nor does it make inroads on that traditionally made available to deepsea ILA labor by marine operators."[6] Pet. App. 135a. The Board disagreed with the ALJ's report only with respect to his reliance on the "surrounding circumstance" that no new motor carrier work was generated by containerization. Apparently fearing that any reliance placed on off-pier work traditions violated the mandate of *ILA I*, the Board sought to explain the lack of a functional relationship between short-stopping and traditional ILA work by pointing to the elimination by containerization of ILA and motor carrier work at the piers.[7] Pet. App. 54a-

6. This same criteria was used by the ALJ to find the work of NVOCCs and consolidators to be functionally related to historic ILA work: "The NVOCCs stuffing and stripping of containers owned or leased by the [steamship lines] is pursuant to a reallocation of work from the piers to off-shore facilities created virtually in its entirety by the development of containerization." Pet. App. 129a.

7. The ILA argues that even where work has been eliminated, "its retention or recapture is perfectly permissible work

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55a. Both of these surrounding circumstances reflect on the true character and origin of the disputed short-stopping work.

In disagreeing with the significance the Board placed on the work elimination circumstance as reflecting on the true objective of the Rules, the Court of Appeals lost sight of the factual findings of the Board, supported by substantial evidence in record, that short-stopping served a different function than had ever been performed by the ILA. Whether or not the enforcement of the Rules "acquires" additional work for longshoremen is not a circumstance the Court of Appeals should have considered in determining functional relationship. Gaining or losing work within the unit may be one of the circumstances reflecting on the purpose of the Rules, but it is not a determinative circumstance and certainly is not relevant to determining functional relationship.[8] It is the purpose for which the

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preservation activity." ILA Brief at 22, *citing American Boiler Mfrs. Assn. v. NLRB*, 404 F.2d 547 (8th Cir. 1968). In *American Boiler*, however, as in *National Woodwork Mfrs. Assn. v. NLRB*, 386 U.S. 612 (1967), the union sought only to recapture work *in the same form* as it existed before the technological innovation changed the form of the work. Thus, the Shipping Group's reliance on these cases ignores the fact that here the ILA does not seek to *recapture* its old work of handling breakbulk cargo, but rather seeks to *replace* its traditional work with the new container work. The ILA may not lawfully capture the new container work unless it is functionally and historically related to traditional ILA work. The ALJ, affirmed by the Board, found no such relation as regards short-stopping and specialty warehouse container work.

8. That employees in a boycotting unit possess the skills or equipment to perform the disputed work, that the work could be performed within the locus of the unit or even that similar work has in the past been performed in the unit would not make a "work preservation" agreement valid if the disputed work was not functionally related to the unit's traditional work. See *Teamsters Local 282 (D. Fortunato, Inc.)*, 197 N.L.R.B. 673 (1972), and other cases cited in ATA Brief at 36-37.

disputed work is performed which reflects upon its function, and not the effect the Rules would have on either the longshoremen's unit or the motor carrier's unit.

### III. An Object Of The Rules Is To Prevent Motor Carriers And Warehousemen From Performing Work Historically And Functionally Unrelated To Traditional ILA Work.

#### A. The "purpose" of the disputed work reflects upon the primary/secondary "object" of the Rules.

To establish that an objective of the Rules is to force the maritime employers "to cease doing business" with motor carriers and warehousemen the "purpose" of the Rules must be examined.[9] The purpose for which the work is performed reflects upon the work's origin and ultimately upon the purpose of the Rules. It is clear from reading the majority and minority opinions in *National Woodwork* that the origin of the disputed work must be considered in determining its relationship to the bargaining unit's traditional work. 386 U.S. at 639, 641, 657. Therefore, the Shipping Group's allegation that "[t]he Trucking Group's 'purpose' test is inherently flawed as an adjudicatory calculus" is without merit. ILA Brief at 30.

The ALJ and the Board,[10] as well as the Trucking Group, have considered the purpose and origin of the disputed work as a part of the inquiry into "all the surrounding circumstances" this Court has required the Board to examine. *ILA I*, 447 at 507; *National Woodwork*, 386 U.S. at 644. The Court also directed the Board to examine "the transformation of several interrelated industries or types of work" and the "relationship between the work as it existed before the innovation and as the agreement proposes to preserve it."[11] *ILA I* at 507. According to the

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9. The Court in *ILA I* held that "[a]mong the primary *purposes* protected by the Act is 'the *purpose* of preserving for the contracting employees themselves work traditionally done by them.' *Pipefitters, supra* at 517." *ILA I*, 447 U.S. at 504 (emphasis added).

10. The ALJ and the Board considered the purpose for which work was done by the competing work forces in finding

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Footnote continued—

the Rules lawful with respect to consolidation work and unlawful with respect to short-stopping and certain warehouse work. The concept of "purpose" for which the work was performed was stated in different ways: "for reasons related to" Pet. App. 54a, 133a; "in connection with" *id.* at 56a, 59a, 144a; "associated with" *id.* at 134a; and "for such purposes". *Id.*

11. The *Amicus Curiae* Brief of the AFL-CIO proposes that in determining violations of Section 8(e) "the critical inquiry is on the locus of control over the work in question rather than on the past pattern of work distribution;" and that attention should not be focused "on the fortuity of prior patterns of work distribution rather than on the basic threshold consideration of whether the employees are seeking work from their employer over which the employer has the right to control." AFL-CIO Brief at 21, 5. The AFL-CIO would permit a union to use its economic power to negotiate an agreement requiring the use of an employer's "own employees to do the employer's work—*viz.* work over which the employer has the right to control—even if that work previously was done by others." *Id.* at 12. This proposition goes far beyond the issue pending before the Court, and the record in this case is insufficient to permit an intelligent decision to be made on this argument. Furthermore, the proposed interpretation is inconsistent with every decision of this Court since *National Woodwork*. Permitting a union to claim work never before performed in the bargaining unit, simply because the unit employees have the skills and the desire to perform the work, is the type of predatory conduct Sections 8(b)(4) and 8(e) were designed to prohibit. If the power to control work is the litmus test of an employer's primary status then, for example, any unionized group of employees of a general construction contractor could force the general contractor to assign to them work which would normally be subcontracted and assigned to other tradesmen. There would be chaos in the labor field as competing unions jockeyed for work each claimed its members could and desired to perform.

ALJ, the purpose for which longshoremen or motor carriers and warehousemen perform their work reflects upon the "economic personality" of the industries competing for the work. Pet. App. 111a. He was well aware that "[w]hatever the dimension of this factor, the vital reference point remains whether the objectives are relevant to the primary work unit, or seek to reconcile differences with other employers." Neither the ALJ nor ATA has used "purpose" as a definitive legal test, as alleged by the Shipping Group, but only as a surrounding circumstance to help determine the origin of the work in dispute which ultimately reflects upon the objectives of the Rules.

In *ILA I*, this Court observed that the ILA did *not* try to prevent maritime employers from using container ships at all, "though such an approach would have been consistent with *National Woodwork* and *Pipefitters*." *ILA I*, 447 U.S. at 510. The Shipping Group asserts that "[t]he necessary corollary is that an agreement that longshoremen would stuff and strip all containers at the piers would also have been lawful work preservation." ILA Brief at 30. This "necessary corollary" is in fact a *non sequitur* which flies in the face of *ILA I*. There the Court stated that the instant case "presents a much more difficult problem than either *National Woodwork* or *Pipefitters*" (where the work claimed by the union was the same work it had always done) precisely because the ILA "did not insist on doing the work as it had always been done." *ILA I*, 447 U.S. at 510. Instead of claiming the work of loading and unloading breakbulk cargo from ships, the ILA claims the new work of stuffing and stripping containers.

Continuing its reliance on *non sequiturs*, the Shipping Group argues that if the ILA can stuff and strip all containers, then all stuffing and stripping must be functionally and historically related to traditional longshore work, and if all stuffing and stripping is functionally and historically related to traditional longshore work, then the stuffing and stripping associated with short-stopping and specialty warehouse work must be functionally and historically related to traditional longshore work. ILA Brief at 30. Again, the Shipping Group's argument proceeds on the false premise that this Court sanctioned the stuffing and stripping of all containers in *ILA I*. In reality, this Court recognized that the work claimed by the Rules is different than "the work as it had always been done." *ILA I*, 447 U.S. at 510. Therefore, the Board was directed on remand to compare the "retained work" with "traditional longshore work." *Id.* If this Court's suggestion that the ILA could have prevented maritime employers from using container ships had established a historical and functional relationship between all container work and traditional longshore work, as argued by the Shipping Group, no remand would have been required.



### B. Work transfer is not required to establish the secondary objective.

The Shipping Group boldly states the inaccurate proposition that:

> Work acquisition by definition must entail a loss by other employees of the work transferred to the acquiring employees. The Board could not—and, indeed never purported to—make a finding that the functions of warehousing or trucking employees were relocated to the piers.[12] ILA Brief at 19.

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12. No significance can be attached to the Board's failure to make findings of fact as to ILA "acquisition" or "transfer" of work from the motor carriers to the piers or whether ILA container work would "duplicate the off-pier work of truckers

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No authority was cited for this proposition, and we have found none except for the Court of Appeals' decision below.

In requiring that work be transferred from motor carriers to the piers to establish an unlawful work "acquisition" objective the Court of Appeals ignored the principle that work transfer is not required to establish a secondary boycott. See ATA Brief at 37-41. This Court has said in a case where no work was sought to be transferred to the boycotting unit:

> There are circumstances under which the union's conduct is secondary when one of its purposes is to influence the conduct of an employer other than the struck employer. In these situations, *a union's efforts to influence the conduct of the non-struck employer* are not rendered primary simply because it seeks to benefit the employees of the struck employer. *National Woodwork* itself embraced a view that the *union's conduct would be secondary if its tactical object was to influence another employer. NLRB v. Enterprise Assn. of Steam Pipefitters Local No. 638*, 429 U.S. 507, 528 n.16 (1977) (emphasis added).

The General Counsel did not have the burden of proving that motor carriers lost work which was transferred to the longshoremen's unit; it only had to show that an objective of the Rules was to disrupt shipping patterns involving off-pier businesses within the 50-mile zones for the purpose of increasing the prospects that

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and warehousemen." ILA Brief at 35. No serious issue ever surfaced as to these matters until the decision by the Court of Appeals. Pet. App. at 28a. If findings regarding "acquisition" or "transfer" are relevant, this case should be remanded for the taking of additional evidence.



some or all of the short-stopped and specialty warehouse container work would be performed on the piers.[13] The record clearly shows that such disruption was the objective of the Rules. Since short-stopping and specialty warehouse work serves land transportation purposes and is not functionally related to traditional ILA work, the proscribed secondary object of the Rules has been shown.

## CONCLUSION

The judgment of the Court of Appeals should be reversed and the Decision and Order of the Board should be enforced.

Respectfully submitted,

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13. The Shipping Group's argument that "ten years of injunctions" preventing the operation of the Rules permitted the establishment of current shipping patterns, which would otherwise have developed around the piers rather than trucking terminals and warehouses within the 50-mile zone, is without merit and is immaterial. ILA Brief at 25. Implementing the Rules as to short-stopping and warehousing when they were first negotiated would have had the same effect on shipping patterns as when they were implemented in 1984. Shippers would have reacted the same way, by choosing between having the work performed by ILA labor or by someone beyond the 50-mile zones to avoid ILA labor, for the same reasons.